Office-Supreme Court, U.S.
FILED
MAY 21 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1350

In The

Supreme Court of the United States

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

vs.

CITY OF BOULDER, COLORADO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICI CURIAE BRIEF FOR THE STATES OF ALASKA, ARKANSAS, COLORADO, DELAWARE, HAWAII, ILLINOIS, IOWA, KANSAS, MAINE, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NEW YORK, OHIO, RHODE ISLAND, TEXAS, VERMONT, WEST VIRGINIA, AND WISCONSIN, AND THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF THE PETITIONER

J. D. MacFARLANE
Attorney General

MARY J. MULLARKEY
Solicitor General

B. LAWRENCE THEIS
First Assistant Attorney General
Antitrust Section

THOMAS P. McMAHON
Assistant Attorney General
Antitrust Section
Counsel of Record

Attorneys for the
State of Colorado

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

Wilson L. Condon
Attorney General
Louise E. Ma
Mark E. Ashburn
Assistant Attorneys General
Office of the Attorney General
420 L Street, Suite 100
Anchorage, Alaska 99501
Attorneys for the
State of Alaska

Steve Clark
Attorney General
David L. Williams
Deputy Attorney General
Litigation Division
Justice Building
Little Rock, Arkansas 72201
Attorneys for the
State of Arkansas

Richard S. Gebelein
Attorney General
Robert P. Lobue
Deputy Attorney General
820 North French Street
Wilmington, Delaware 19801
Attorneys for the
State of Delaware

Tany S. Hong
Attorney General
State of Hawaii
Shelton G. W. Jim On
Deputy Attorney General
Antitrust Division
335 Merchant Street,
Room 214-A
Old Federal Building
Honolulu, Hawaii 96813
Attorneys for the
State of Hawaii

Tyrone C. Fahner
Attorney General of the
State of Illinois
Thomas M. Genovese
Assistant Attorney General
Chief, Antitrust Division
188 West Randolph Street
Suite 2118
Chicago, Illinois 60601
Attorneys for the
State of Illinois

Thomas J. Miller
Attorney General of Iowa
John R. Perkins
Assistant Attorney General
Division of Antitrust
Enforcement
Hoover State Office Building
Des Moines, Iowa 50319
Attorneys for the
State of Iowa

Robert T. Stephan
Attorney General
Wayne E. Hundley
Deputy Attorney General
Chief, Antitrust & Consumer
Protection Division
2nd Floor,
Kansas Judicial Center
Topeka, Kansas 66612
Attorneys for the
State of Kansas

Richard S. Cohen
Attorney General
Cheryl Harrington
Section Chief
Consumer & Antitrust Division
State House
Augusta, Maine 04333
Attorneys for the
State of Maine

Stephen H. Sachs
Attorney General of Maryland
Charles O. Monk, II
Assistant Attorney General and
Chief, Antitrust Division
131 East Redwood Street
Suite 701
Baltimore, Maryland 21202
Attorneys for the
State of Maryland

Warren R. Spannaus
Attorney General
Stephen P. Kilgriff
Special Assistant
Attorney General
Chief, Antitrust Division
Second Floor, Ford Building
117 University Avenue
St. Paul, Minnesota 55155
Attorneys for the
State of Minnesota

John Ashcroft
Attorney General
William Newcomb
Assistant Attorney General
Chief Counsel,
Trade Offenses Division
Office of the Attorney General
Box 899
Jefferson City, Missouri 54102
Attorneys for the
State of Missouri

Mike Greely
Attorney General
State of Montana
Jerome J. Cate, Chief
Antitrust Enforcement Bureau
Office of Attorney General
State Capitol
Helena, Montana 59620
Attorneys for the
State of Montana

Paul L. Douglas
Attorney General
State of Nebraska
Dale A. Comer
Assistant Attorney General
Antitrust Division
2115 State Capitol
Lincoln, Nebraska 68509
Attorneys for the
State of Nebraska

Jeff Bingaman
Attorney General
James J. Wechsler
Richard H. Levin
Assistant Attorneys General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
Attorneys for the
State of New Mexico

Robert Abrams
Attorney General of the
State of New York
Lloyd Constantine
Assistant Attorney General
Chief, Antitrust Bureau
Two World Trade Center
Room 4686
New York, New York 10047
Attorneys for the
State of New York

William J. Brown
Attorney General of Ohio
Eugene F. McShane
Assistant Attorney General
Chief, Antitrust Section
1700 LeVeque Tower
50 West Broad Street
Columbus, Ohio 43215
Attorneys for the
State of Ohio

LeRoy S. Zimmerman
Attorney General
Eugene F. Waye
Deputy Attorney General
Chief, Antitrust Division
John L. Shearburn
Deputy Attorney General
Antitrust Division
Commonwealth of
Pennsylvania
16th Floor,
Strawberry Square Building
Harrisburg, Pennsylvania 17120
Attorneys for the
State of Pennsylvania

Dennis J. Roberts, II
Attorney General
Patrick J. Quinlan
Special Assistant
Attorney General
Director,
Antitrust Enforcement Unit
Department of
Attorney General
72 Pine Street, Fourth Floor
Providence,
Rhode Island 02903
Attorneys for the
State of Rhode Island

Mark White
Attorney General
David Bragg
Chief, Consumer Protection
& Antitrust Division
Linda A. Aaker
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711
Attorneys for the
State of Texas

John J. Easton, Jr.
Attorney General
Jay I. Ashman
Assistant Attorney General
Glenn A. Jarrett
Assistant Attorney General
109 State Street
Montpelier, Vermont 05602
Attorneys for the
State of Vermont

Chauncey H. Browning
Attorney General
Charles G. Brown
Deputy Attorney General
Director, Antitrust Division
Room 26 East
State Capitol
Charleston,
West Virginia 25305
Attorneys for the
State of West Virginia

Bronson C. LaFollette
Attorney General
Michael L. Zaleski
Assistant Attorney General
Antitrust & Criminal
Litigation Unit
114 East State Capitol
Madison, Wisconsin 53702
Attorneys for the
State of Wisconsin

QUESTION PRESENTED

Is the mere exercise of general home rule governing power by municipalities the equivalent of "state" action which is *by itself* sufficient to qualify for federal antitrust immunity?

TABLE OF CONTENTS

Pages

Question Presented i

Table of Contents ii

Interest of *Amici Curiae* 1

Statement of the Case 2

Summary of Argument 5

Argument:

I. The Tenth Circuit's decision disregards the teaching of the Supreme Court in *City of Lafayette* with respect to the antitrust immunity status of cities. 5

A. The Tenth Circuit's decision granting virtually absolute antitrust immunity to home rule cities, and the anticompetitive consequences which will necessarily result therefrom, directly contravene the majority holding and rationale in *City of Lafayette.* 6

B. The Tenth Circuit's decision conferring on home rule cities the status of states runs directly counter to the plurality ruling in *City of Lafayette.* 8

C. The teaching of *City of Lafayette* is applicable to municipalities even when they possess home rule powers. 11

1. The rationale on which *City of Lafayette* is based logically extends to home rule cities. 11

2. The only lower federal courts which have considered the *Lafayette* rationale in a home rule context have found *City of Lafayette* to be applicable to home rule cities. 12

TABLE OF CONTENTS—Continued

Pages

II. The Tenth Circuit's attempt to distinguish *City of Lafayette* on the ground that it is applicable only to so-called "proprietary" activity is unfounded. 15

III. The Tenth Circuit has not properly applied the state action immunity tests established by the Supreme Court for all subordinate governmental entities. 20

A. The state constitutional grant of general home rule governing power to Colorado municipalities does not evidence contemplation by the State of Colorado that such power may be used in any anti-competitive fashion. 22

B. The State of Colorado has no specific policy with respect to cable television and does not exercise supervisory power over that subject-matter area. 25

Conclusion 28

TABLE OF AUTHORITIES

CASES

Bates v. State Bar of Arizona, 433 U. S. 350 (1977) 21

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U. S. 97 (1980) 9, 17, 21

Cantor v. Detroit Edison Co., 428 U. S. 579 (1976) 15, 21, 25, 26

Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. 711 (D. D. C. 1979), *aff'd mem.*, No. 79-1658 (D. C. Cir. July 3, 1980), *cert. denied*, 101 S. Ct. 1355 (1981) 9

TABLE OF AUTHORITIES—Continued

Pages

Cedar-Riverside Associates v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Associates v. City of Minneapolis*, 606 F. 2d 254 (8th Cir. 1979) 9, 19

City and County of Denver v. Mountain States Telephone & Telegraph Co., 67 Colo. 225, 184 P. 604, *dismissed for lack of jurisdiction*, 251 U. S. 545 (1919), *overruled on other grounds, People ex rel. P.U.C. v. Mountain States Telephone & Telegraph Co.*, 125 Colo. 167, 243 P. 2d 397 (1952) 20

City of Denver v. Sweet, 138 Colo. 41, 329 P. 2d 441 (1958) 11, 12, 27

City of Golden v. Ford, 141 Colo. 472, 348 P. 2d 951 (1960) 27

City of Lafayette v. Louisiana Power & Light Co., 435 U. S. 389 (1978) 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 23, 26, 28

City of Mishawaka v. American Electric Power Co., 465 F. Supp. 1320 (N. D. Ind. 1979), *aff'd in part, rev'd in part*, 616 F. 2d 976 (7th Cir.), *cert. denied*, 101 S. Ct. 65 (1981) 9, 18

Community Antenna Television v. City of Wichita, 205 Kan. 537, 471 P. 2d 360 (1970) 19

Community Communications Co. v. City of Boulder, 630 F. 2d 704 (10th Cir. 1980) 4, 7, 16, 19, 23, 25, 27

Community Communications Co. v. City of Boulder, 485 F. Supp. 1035 (D. Colo. 1980) 3, 4

TABLE OF AUTHORITIES—Continued

Pages

Corey v. Look, 641 F. 2d 32 (1st Cir. 1981) 18, 22, 26

Feminist Women's Health Center v. Mohammad, 586 F. 2d 530 (5th Cir. 1978), *cert. denied*, 444 U. S. 924 (1979) 18, 24

Garten Enterprises v. City of Kansas City, 219 Kan. 620, 549 P. 2d 864 (1976) 7

Ginsberg v. City and County of Denver, 164 Colo. 572, 436 P. 2d 685 (1968) 19

Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron*, No. 80-3121 (6th Cir. Jan. 14, 1980) 9, 13, 14, 18, 19, 23, 27

Goldfarb v. Virginia State Bar, 421 U. S. 773 (1975) 21, 25, 28

Grams v. Boss, 97 Wis. 2d 332, 294 N. W. 2d 473 (1980) 2

Grendel's Den, Inc. v. Goodwin, 5 Trade Reg. Rep. (CCH) ¶ 63,978 (1st Cir. May 4, 1981) 18, 21

Guthrie v. Genesee County, 494 F. Supp. 950 (W. D. N. Y. 1980) 15, 20, 24

Highfield Water Co. v. Public Service Commission, 488 F. Supp. 1176 (D. Md. 1980) 9, 10, 18

In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N. D. Cal. 1979) 13, 14, 21, 22, 24

TABLE OF AUTHORITIES—Continued

Pages

In re Mountain States Telephone & Telegraph Co., 73 P. U. R. 3d 161 (Colo. Pub. Util. Comm'n. 1968) 25

Kurek v. Pleasure Driveway & Park District, 557 F. 2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U. S. 992, *reinstated on remand*, 583 F. 2d 378 (1978), *cert. denied*, 439 U. S. 1090 (1979) 20, 24

Lee v. Norick, 447 P. 2d 1015 (Okla. 1968) 7

Manor Vail Condominium Ass'n v. Town of Vail, — Colo. —, 604 P. 2d 1168 (1980) 23

Marin County Board of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P. 2d 833 (Sup. Ct. 1976) 2

Mason City Center Associates v. City of Mason City, 468 F. Supp. 737 (N. D. Iowa 1979) 13, 18, 24, 26

National Society of Professional Engineers v. United States, 435 U. S. 679 (1978) 1

New Motor Vehicle Board v. Orrin W. Fox Co., 439 U. S. 96 (1978) 9, 17

Northern Pacific Railway v. United States, 356 U. S. 1 (1958) 2

Nugent v. City of East Providence, 103 R. I. 1518, 238 A. 2d 758 (1968) 27

Oates v. Eastern Bergen Co., 113 N. J. Super. 371, 273 A. 2d 795 (1971) 2

TABLE OF AUTHORITIES—Continued

Pages

Parker v. Brown, 317 U. S. 341 (1943) 20

People ex rel. P. U. C. v. Mountain States Telephone & Telegraph Co., 125 Colo. 167, 243 P. 2d 397 (1952) 20, 27

Pinehurst Airlines, Inc. v. Resort Air Services, Inc., 476 F. Supp. 543 (M. D. N. C. 1979) 15, 18, 20, 24

Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 234 N. W. 453 (Minn. 1931) 2

Princeton Community Phone Book, Inc. v. Bate, 582 F. 2d 706 (3d Cir.), *cert. denied*, 439 U. S. 966 (1978) 9

Pueblo Aircraft Services, Inc. v. City of Pueblo, 498 F. Supp. 1205 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980) 9, 13, 15, 23

Ray v. City & County of Denver, 109 Colo. 74, 121 P. 2d 886 (1942) 27

Shrader v. Horton, 471 F. Supp. 1236 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980) 9, 18, 21

Standard Oil Co. v. FTC, 340 U. S. 231 (1951) 2

State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N. W. 2d 1 (1966) 2

Stauffer v. Town of Grand Lake, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980) 15, 18, 22

TABLE OF AUTHORITIES—Continued

Pages

Tri-County Electric Association v. City of Gillette, 584 P. 2d 995 (Wyo. 1978) 7

TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U. S. 556 (1970) 27

United States v. Southern Motor Carriers Rate Conference, 467 F. Supp. 471 (N. D. Ga. 1979), *appeal docketed*, No. 79-3741 (5th Cir. Nov. 15, 1979) 10

United States v. Southwestern Cable Co., 392 U. S. 157 (1968) 27

United States v. Texas State Board of Public Accountancy, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd per curiam*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979) 18, 24

VFW Post 4264 v. City of Steamboat Springs, 195 Colo. 44, 575 P. 2d 835 (1978) 7

Whitworth v. Perkins, 559 F. 2d 378 (5th Cir. 1977), *vacated and remanded sub nom. City of Impact v. Whitworth*, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979) 18, 21

Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N. D. Tex. 1978) 12, 13, 14, 20, 21, 23, 24

CONSTITUTIONAL PROVISIONS

Alas. Const. art. X, sec. 11 1

Colo. Const. art. XX, secs. 1, 6 ..... 1, 2, 6, 11, 13, 22, 24, 26

TABLE OF AUTHORITIES—Continued

	Pages
Haw. Const. art. VIII, sec. 2	1
Ill. Const. art. VII, sec. 6	1
Iowa Const. art. III, sec. 38A	1
Kan. Const. art. XII, sec. 5	1, 6
Me. Const. art. VIII	1
Md Const. arts. XI-A, XI-E, XI-F	1
Minn. Const. art. XII, sec. 3	1
Mo. Const. art. VI, secs. 18(a)-(s), 19-19(a)	1
Mont. Const. art. XI, secs. 5-6	1
Neb. Const. art. XI, secs. 2-5	1
N. M. Const. art. X, sec. 6	1, 6
N. Y. Const. art. IX, sec. 2	1
Ohio Const. art. XVIII, secs. 1-3, 7	1
Okla. Const. art. XVIII, sec. 3(a)	6
Pa. Const. art. IX, sec. 2	1
R. I. Const. art. of amend. XXVII, secs. 1-7	1
Tex. Const. art. XI, sec. 5	1
Utah Const. art. XI, sec. 5	6
W. Va. Const. art. VI, sec. 39(a)	1
Wis. Const. art. XI, sec. 3	1
Wyo. Const. art. XIII, sec. 1	6

TABLE OF AUTHORITIES—Continued

Pages

STATUTES

15 U. S. C. sec. 1 4

Alas. Stat. secs. 45.50.562 *et seq.* 1

Ark. Stat. Ann. 1979, secs. 70-101 *et seq.* 1

Colo. Rev. Stat. 1973, secs. 6-4-101 *et seq.* 1, 26

6 Del. C. secs. 2101 *et seq.* (1980 Cum. Supp.) 1

Haw. Rev. Stat. 1976, secs. 480-4 *et seq.* 1

Ill. Ann. Stat. ch. 38, secs. 60-3 *et seq.* 1

Iowa Code 1979, secs. 553.4 *et seq.* 1

Kan. Stat. Ann. 1976, secs. 50-101 *et seq.* 1

Me. Rev. Stat. Ann. secs. 1101 *et seq.* 1

Md. Com. Law Code Ann. 1975, secs. 11-204 *et seq.* (1980 Cum. Supp.) 1

Minn. Stat. 1980, secs. 325D.51 *et seq.* 1

Mo. Ann. Stat. secs. 416.031 *et seq.* 1

Mont. Rev. Codes Ann. 1979, secs. 30-14-205 *et seq.* 1

Neb. Rev. Stat. 1943, secs. 59-801 *et seq.* 1

N. M. Stat. Ann. 1978, secs. 57-1-1 *et seq.* 1

N. Y. Gen. Bus. Law secs. 340 *et seq* (1980-81 Cum. Supp.) 1

Ohio Rev. Code Ann. secs. 1331.01 *et seq.* 1

R. I. Gen. Laws 1969, secs. 6-36-4 *et seq.* (1980 Cum. Supp.) 1

TABLE OF AUTHORITIES—Continued

Pages

Tex. Bus. & Com. Code Ann. tit. 2, sec. 15.04 1

W. Va. Code 1980, secs. 47-18-3 *et seq.* 1

Wis. Stat. Ann. secs. 133.03 *et seq.* (1980-81 Cum. Supp.) 1

ORDINANCES AND RESOLUTION

Boulder, Colorado, City Ordinance No. 2846 (Oct. 6, 1964) 3, 19, 22

Boulder, Colorado, City Resolution No. 7D (July 5, 1966) 3

Boulder, Colorado, City Ordinance No. 4472 (Jan. 1, 1980) 3, 22

Boulder, Colorado, City Ordinance No. 4473 (Dec. 18, 1979) 3, 22

Boulder, Colorado, City Ordinance No. 4515 (July 22, 1980) 3, 22

OTHER AUTHORITIES

League of Kansas Municipalities, Information for Kansas Officials (1979) 6

1 United States Bureau of the Census, 1977 Census of Governments, Governmental Organization (1977) 8

Vanlandingham, *Constitutional-Municipal Home Rule Since the AMA (NLC) Model,* 17 Wm. & Mary L. Rev. 1 (1975) 6

INTEREST OF AMICI CURIAE

The twenty-three states listed on the cover join in this brief as *amici curiae* in support of petitioner Community Communications Company, Inc. ("CCC"). Twenty of those states have adopted constitutional provisions authorizing their municipalities to exercise home rule self-governing authority.[1] Similarly, twenty-one of the *amici* states have enacted antitrust legislation to foster competition within their own borders.[2]

The latter enactments constitute legislative determinations that competition will result in lower prices and better goods and services for the residents of those states. *See, e. g., National Society of Professional Engineers v. United States*, 435 U. S. 679, 695 (1978). Such state antitrust statutes are frequently modeled upon, and construed in accordance with federal judicial interpretations of, the

---

1 *See* Alas. Const. art. X, sec. 11; Colo. Const. art. XX, secs. 1, 6; Haw. Const. art. VIII, sec. 2; Ill. Const. art. VII, sec. 6; Iowa Const. art. III, sec. 38A; Kan. Const. art. XII, sec. 5; Me. Const. art. VIII; Md. Const. arts. XI-A, XI-E, XI-F; Minn. Const. art. XII, sec. 3; Mo. Const. art. VI, secs. 18 (a)-(s), 19-19 (a); Mont. Const. art. XI, secs. 5-6; Neb. Const. art. XI, secs. 2-5; N. M. Const. art. X, sec. 6; N. Y. Const. art. IX, sec. 2; Ohio Const. art. XVIII, secs. 1-3, 7; Pa. Const. art. IX, sec. 2; R. I. Const. art. of amend. XXVII, secs. 1-7; Tex. Const. art. XI, sec. 5; W. Va. Const. art. VI, sec. 39 (a); Wis. Const. art. XI, sec. 3.

2 *See* Alas. Stat. secs. 45.50.562 *et seq.*; Ark. Stat. Ann. 1979, secs. 70-101 *et seq.*; Colo. Rev. Stat. 1973, secs. 6-4-101 *et seq.*; 6 Del. C. secs. 2101 *et seq.* (1980 Cum. Supp.); Haw. Rev. Stat. 1976, secs. 480-4 *et seq.*; Ill. Ann. Stat. ch. 38, secs. 60-3 *et seq.*; Iowa Code 1979, secs. 553.4 *et seq.*; Kan. Stat. Ann. 1976, secs. 50-101 *et seq.*; Me. Rev. Stat. Ann. secs. 1101 *et seq.*; Md. Com. Law Code Ann. 1975, secs. 11-204 *et seq.* (1980 Cum. Supp.); Minn. Stat. 1980, secs. 3250.51 *et seq.*; Mo. Ann. Stat. secs. 416.031 *et seq.*; Mont. Rev. Codes Ann. 1979, secs. 30-14-205 *et seq.*; Neb. Rev. Stat. 1943, secs. 59-801 *et seq.*; N. M. Stat. Ann. 1978, secs. 57-1-1 *et seq.*; N. Y. Gen. Bus. Law secs. 340 *et seq.* (1980-81 Cum. Supp.); Ohio Rev. Code Ann. secs. 1331.01 *et seq.*; R. I. Gen. Laws 1969, secs. 6-36-4 *et seq.* (1980 Cum. Supp.); Tex. Bus. & Com. Code Ann. tit. 2, sec. 15.04; W. Va. Code 1980, secs. 47-18-3 *et seq.*; Wis. Stat. Ann. secs. 133.03 *et seq.* (1980-81 Cum. Supp.).

Sherman Act.[3] "The Sherman Act [itself] was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway v. United States*, 356 U. S. 1, 4 (1958).

In the case at hand, the Tenth Circuit found the city of Boulder, Colorado, to be exempt from the antitrust laws because of its home rule status. That decision allows virtually every home rule city in the nation, acting solely on its own initiative, to avoid compliance with either federal or state[4] antitrust laws when exercising home rule powers. In effect, the decision elevates local action taken under the guise of municipal self-government to a position of superiority over "[t]he heart of our national economic policy [which] long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U. S. 231, 248 (1951).

In light of the foregoing, the interests of the citizens of the *amici* states in obtaining the benefits of competition have been frustrated by the decision of the court below.

STATEMENT OF THE CASE

Facts

Boulder is a "home rule" city under Colo. Const. art. XX, sec. 6 (App. E to Colo. *amicus curiae* br. for *cert.*). In 1964, acting under its power to regulate public rights-of-way (*see* Colo. Const. art. XX, sec. 1 [App. F to Colo.

3 *See, e. g., Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N. W. 2d 473, 480 (1980); *Marin County Bd. of Realtors v. Palsson*, 130 Cal. Rptr. 1, 549 P. 2d 833 (Sup. Ct. 1976); *Oates v. Eastern Bergen Co.*, 113 N. J. Super. 371, 273 A. 2d 795 (1971); *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.*, 234 N. W. 453 (Minn. 1931).

4 *See, e. g., State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N. W. 2d 1 (1966) (because of federal antitrust exemption, baseball exempt from state antitrust statute interpreted according to Sherman Act).

amicus curiae br. for *cert.*]), Boulder granted to a cable company a 20-year, nonexclusive permit to build a cable t.v. system in the city. Boulder, Colorado, City Ordinance No. 2846 (Oct. 6, 1964) (App. G to Colo. *amicus curiae* br. for *cert.*). In 1966, that firm assigned the permit to petitioner CCC with Boulder's concurrence. Boulder, Colorado, City Resolution No. 7D (July 5, 1966) (J. A. 9).

Since 1966, the cable t.v. system established by CCC has provided service to one area of Boulder, consisting of approximately 20% of the city's residential units. *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1036 (D. Colo. 1980). The system's programming has consisted of cable retransmission of area broadcast t.v. stations. *Id.*

In May of 1979, CCC announced plans to expand its system by installing cable in other areas of the city. *Id.* at 1037. Shortly thereafter, Boulder Communications Company ("BCC"), another cable t.v. firm, also proposed a cable system for the city. *Id.* The city then hired a consultant and began a review of the cable t.v. situation in the Boulder market. *Id.*

Following that review, Boulder imposed a 3-month moratorium on cable t.v. installation in the city. Boulder, Colorado, City Ordinances No. 4472 (Jan. 1, 1980) and No. 4473 (Dec. 18, 1979) (Apps. H and I, respectively, to Colo. *amicus curiae* br. for *cert.*). The temporary effect of that action was to prohibit CCC from geographically expanding its system beyond the area already served. *Id.* Subsequently, however, Boulder made that limitation permanent. Boulder, Colorado, City Ordinance No. 4515 (July 22, 1980) (App. J to Colo. *amicus curiae* br. for *cert.*).

Course of Proceedings

On January 15, 1980, CCC filed the instant action in federal district court in Denver, Colorado, against Boulder, BCC, and certain principals of BCC. The complaint alleged, *inter alia,* that the defendants had conspired to restrict CCC's expansion of its cable t.v. system within the city in violation of section 1 of the Sherman Act, 15 U. S. C. sec. 1. In defense, Boulder asserted in pertinent part that it was exempt from the federal antitrust laws. The district court, relying on *City of Lafayette v. Louisiana Power & Light Co.,* 435 U. S. 389 (1978), ruled that the city was not so immune. *Community Communications Co. v. City of Boulder,* 485 F. Supp. at 1039.

Upon appeal to the Tenth Circuit, a divided panel of that court reversed. The panel majority distinguished *City of Lafayette* and held that, because of its "home rule" status, action by the city of Boulder is equivalent to action by the State of Colorado for federal antitrust immunity purposes. *Community Communications Co. v. City of Boulder,* 630 F. 2d 704, 708 (10th Cir. 1980).

In dissent, Judge Markey took issue with the conclusions of the panel majority.[5] He was of the view that home rule cities are not to be treated as states even though they may be "sovereigns" within their own borders. *Id.* at 717. He reasoned that the so-called state action "exemption" is founded on the dual federal-state system of sovereignty and does not envision "city-states." *Id.* Accordingly, he believed that home rule cities do not have the absolute antitrust immunity accorded them by the panel majority. *Id.* at 711 n. 2, 717, 718, 719.

---

5 Judge Markey, Chief Judge of the United States Court of Customs and Patent Appeals (sitting by designation), dissented on both antitrust and first amendment grounds. *See generally* 630 F. 2d at 709-20.

The case is now before this Court pursuant to CCC's petition for a writ of *certiorari*. That petition was granted and writ issued in accordance with an order of this Court dated April 6, 1981.

SUMMARY OF ARGUMENT

In reaching its decision, the Tenth Circuit erred in several significant ways. First, in direct rejection of *City of Lafayette*, that court conferred virtually blanket antitrust immunity on thousands of home rule cities across the country, a result likely to have a severely disruptive effect on the operation of the nation's economic system. Additionally, the appellate court attempted to distinguish *City of Lafayette* on the unfounded basis that it is applicable only to "proprietary" activity. Moreover, the Tenth Circuit ignored the thrust of recent Supreme Court decisions significantly limiting the ability of governmental entities to claim state action immunity for their activities. Furthermore, the court rejected the *Lafayette* requirement that the state must authorize the particular kind of anticompetitive activity engaged in by the city. Finally, the appellate court concluded that the policy and supervision of the city itself could take the place of the necessary state policy and supervision. On each such point, the decision of the Tenth Circuit contravenes prior decisions of this Court.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION DISREGARDS THE TEACHING OF THE SUPREME COURT IN CITY OF LAFAYETTE WITH RESPECT TO THE ANTITRUST IMMUNITY STATUS OF CITIES.

In the seminal case of *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978), this Court expressly ruled that cities are subject to the federal anti-

trust laws and that they are not given the same federal deference as the states which create them. In the case at hand, the Tenth Circuit has exempted home rule cities from that holding, with potentially disastrous consequences for the "overarching and fundamental policies . . ." established by the antitrust laws. *Id.* at 399.

A. The Tenth Circuit's decision granting virtually absolute antitrust immunity to home rule cities, and the anticompetitive consequences which will necessarily result therefrom, directly contravene the majority holding and rationale in City of Lafayette.

In this case the Tenth Circuit held that the city of Boulder, Colorado, has state action immunity from the antitrust laws when acting on its own in the exercise of its general home rule self-governing powers. *See* 630 F. 2d at 708. In essence, the appellate court ruled that home rule cities stand in the shoes of the state for purposes of federal antitrust immunity analysis. *See id.*

The Tenth Circuit's decision has potentially enormous precedential significance nationwide. Within the Tenth Circuit alone, all six states have constitutional home rule provisions,[6] with at least 851 home rule municipalities operating thereunder.[7] Some 34 states in the other ten circuits across the nation also have constitutional provisions authorizing municipal home rule,[8] and thousands more such cities undoubtedly exist in those states.

---

6 *See* Colo. Const. art. XX, secs. 1 and 6; Kan. Const. art. XII, sec. 5; N. M. Const. art. X, sec. 6; Okla. Const. art. XVIII, sec. 3 (a); Utah Const. art. XI, sec. 5; Wyo. Const. art. XIII, sec. 1.

7 *See* Lists of Home Rule Municipalities in Colorado (56 cities), Oklahoma (79 cities), and Wyoming (90 cities) (Apps. B, C, and D, respectively, to Colo. *amicus curiae* br. for *cert.*), and League of Kansas Municipalities, Information for Kansas Officials at 7-12 (1979) (626 home rule cities).

8 *See* Vanlandingham, *Constitutional-Municipal Home Rule Since the AMA (NLC) Model*, 17 Wm. & Mary L. Rev. 1, 4 n. 9 (1975).

Some states, like Colorado and Oklahoma within the Tenth Circuit, are empowered on purely local matters to enact ordinances superseding conflicting state laws.[9] The effect of the Tenth Circuit's decision is to ensure the virtually absolute antitrust immunity of cities in those states whenever they exercise their home rule powers in even arguably appropriate subject-matter areas. *See, e. g., Community Communications Co. v. City of Boulder*, 630 F. 2d at 711 n. 2 (Markey, C. J., dissenting) (The Tenth Circuit's decision results in "absolute immunity of [all 56 constitutional home rule] Colorado cities from the Sherman Act."). The decision has the same effect in many other of those states, similar to Kansas and Wyoming in the Tenth Circuit, in situations like the instant one where home rule ordinances do not conflict with state statutes and the cities therefore have the same power over the particular subject area as do the state legislatures.[10]

If allowed to stand, then, the Tenth Circuit's ruling will result in many thousands of home rule cities across the nation being free to act individually in defiance of the antitrust laws. The creation of such blanket antitrust immunity, and the resultant interference with the fundamental national economic policy of competition, are in direct conflict with principles set forth in *City of Lafayette*.

In *Lafayette*, a majority of this Court, noting that there exists a heavy presumption against implied exclu-

---

9 *See, e. g., VFW Post 4264 v. City of Steamboat Springs*, 195 Colo. 44, 575 P. 2d 835 (1978); *Lee v. Norick*, 447 P. 2d 1015 (Okla. 1968).

10 *See, e. g., Garten Enterprises v. City of Kansas City*, 219 Kan. 620, 549 P. 2d 864 (1976). *Cf. Tri-County Elec. Ass'n v. City of Gillette*, 584 P. 2d 995 (Wyo. 1978) (legislature has power over municipal corporations except as provided in constitutional home rule provision).

sion from the coverage of the antitrust laws, 435 U.S. at 398, rejected the contention that the Sherman Act was not intended to apply to local governments. *See id.* at 394, 408. Contrary to the decision of the Tenth Circuit, in *City of Lafayette* this Court ruled in effect that "'A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws.'" *Id.* at 393 (citation omitted).

The basis for the Supreme Court majority's determination in this regard was the dual federal-state system of sovereignty in this country, *id.* at 400, coupled with the existence of almost 40,000 local government units nationwide[11] having "broad authority for general governance . . . ." *Id.* at 407-08 (footnote omitted). The *Lafayette* majority was concerned that serious impairment of the national economic policy established by the anti-trust laws would occur if those local governmental units were free to make their own economic choices without regard for the ensuing anticompetitive effects, *id.* at 408, the very result which the Tenth Circuit's decision assures.

B. The Tenth Circuit's decision conferring on home rule cities the status of states runs directly counter to the plurality ruling in City of Lafayette.

In the instant case the Tenth Circuit ruled that the actions and policies of home rule cities are sufficient, in and of themselves and without the necessity for any corresponding state policy, to meet the requisites for state action immunity. *See* 630 F. 2d at 708. Thus, it held in effect that home rule cities occupy a unique status

---

11 There were 38,726 counties, municipalities and townships in this country as of 1977, the most recent year for which figures are currently available. *See* 1 United States Bureau of the Census, 1977 Census of Governments, Governmental Organization, at 1 (1977).

equivalent to states for antitrust immunity purposes. In so concluding, the Tenth Circuit refused to follow the guidance provided by a plurality of this Court in *City of Lafayette*. That refusal was erroneous because the *Lafayette* plurality opinion has been cited as controlling precedent by the most recent Supreme Court state action immunity decision,[12] as well as by virtually every post-*Lafayette* lower federal court case finding state action immunity for a subordinate governmental entity.[13]

In *City of Lafayette*, a four-justice plurality of this Court expressly addressed the contention that a state's political subdivisions are to be treated as the equals of the state itself for antitrust immunity purposes. *See* 435 U. S. at 408. The *Lafayette* plurality emphatically rejected the "equivalency" assertion, stating that "a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state

---

12 *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980). *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978).

13 *See, e. g., Princeton Community Phone Book, Inc. v. Bate*, 582 F. 2d 706, 717, 719-20 (3d Cir.), *cert. denied*, 439 U. S. 966 (1978); *Pueblo Aircraft Serv., Inc. v. City of Pubelo*, 498 F. Supp. 1205, 1209 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980); *Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. 1176, 1190 (D. Md. 1980); *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671, 677 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron*, No. 80-3121 (6th Cir. Jan. 14, 1980); *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority*, 475 F. Supp. 711, 721 (D. D. C. 1979), *aff'd mem.*, No. 79-1658 (D. C. Cir. July 3, 1980), *cert. denied*, 101 S. Ct. 1355 (1981); *Shrader v. Horton*, 471 F. Supp. 1236, 1241-42 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980); *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. 1320, 1347 (N. D. Ind. 1979), *aff'd in part, rev'd in part*, 616 F. 2d 976 (7th Cir.), *cert. denied*, 101 S. Ct. 65 (1981); *Cedar-Riverside Assocs. v. United States*, 459 F. Supp. 1290, 1298 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Assocs. v. City of Minneapolis*, 606 F. 2d 254 (8th Cir. 1979).

government sued as such . . . ." *Id.* at 415. Of particular adverse import for home rule cities was the plurality's dismissal of the argument that action taken by a city when it is exercising the sovereign power of the state *necessarily* reflects state policy and *must* therefore qualify for immunity. *Id.* at 413-14.

In brief, the *Lafayette* plurality ruled that antitrust immunity for a state's subdivisions, such as its cities, extends only to "anticompetitive conduct engaged in as an act of government by the *State*['s] . . . *subdivisions*, pursuant to *state policy to displace competition* . . . ." *Id.* at 413 (emphasis added). Thus, the plurality recognized a dichotomy between the *actions* of the *state's subdivisions*, such as its cities, and the *competition-displacement policy* of the *state itself*. The former are expressly insufficient to achieve antitrust immunity on their own; they may do so only when undertaken pursuant to the latter.

The rationale advanced by the *Lafayette* plurality was that state action immunity derives from the dual federal-state system of sovereignty, but municipalities are not in and of themselves sovereigns under that system,[14] *id.* at 412, a view contrary to that expressed by the Tenth Circuit. In support for its conclusion in this regard, the plurality specifically noted that cities are not treated as the equivalents of states. *Id.* at 412. Rather, they are merely instrumentalities of the state for administering government within the city limits. *Id.* at 413.

---

14 On the state action continuum cities fall between states, which more easily qualify for immunity, and private entities, which have a more difficult time doing so. *See Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. at 1189, 1190; *United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 484 (N. D. Ga. 1979), *appeal docketed*, No. 79-3741 (5th Cir. Nov. 15, 1979).

Of additional significance to the plurality was the fact that municipalities have substantially less than statewide jurisdiction. Accordingly, if left free to make their own economic decisions the anticompetitive policies adopted by cities could reflect varying individual choices rather than one consistent state policy, *id.* at 414, the exact effect guaranteed by the Tenth Circuit's ruling.

C. The teaching of City of Lafayette is applicable to municipalities even when they possess home rule powers.

1. The rationale on which City of Lafayette is based logically extends to home rule cities.

Home rule municipalities were not excepted by the *Lafayette* majority from its reasoning and conclusion, and logically may not be. The majority's holding was predicated in large part on concern over the potential posed by cities for disruption of the national "regime of competition [which is] . . . the fundamental principle governing commerce in this country." 435 U. S. at 398. That disruptive potential is significantly heightened by the possession of home rule self-governing authority because such power affords municipalities broader latitude than usual for their actions. Thus, the *Lafayette* majority's rationale is even more applicable to home rule cities than to nonhome rule cities.

Moreover, the *Lafayette* majority expressly indicated that its rationale applied to all forms of subordinate governmental units, however constituted. The majority noted that its concern was with the large number of such entities possessing broad general governing authority "subject to limitations *in one way or another* imposed by the State." *Id.* at 408 (emphasis added). In this regard, it is significant that even broad home rule powers such as those in Colorado ultimately are subject to such state-imposed limits. *See, e. g.*, Colo. Const. art. XX, sec. 6, and *City*

of Denver v. Sweet, 138 Colo. 41, 329 P. 2d 441 (1958) (full right of home rule self-government applies *only* to matters of purely local and municipal concern).

Additionally, home rule cities were not excepted by the *Lafayette* plurality from its reasoning and conclusion, and logically may not be. The plurality's ruling was premised on the dual federal-state system of sovereignty in this country and the corresponding necessity for one consistent policy within a state relative to the displacement of competition in a particular subject-matter area. The breadth of a municipality's powers within its own boundaries is a matter irrelevant to that *dual* system of sovereignty. Moreover, the broader a city's powers are, the more freedom the city has to act in a way antithetical to a cohesive state competition-displacement policy. Consequently, the *Lafayette* plurality's reasoning extends of its own force to home rule cities.

In light of the foregoing, the teaching of *City of Lafayette* that cities are not equivalent to states for antitrust immunity purposes is as applicable to home rule cities as it is to non-home rule cities. The holdings in two well-reasoned lower federal court decisions confirm this conclusion.

2. The only lower federal courts which have considered the Lafayette rationale in a home rule context have found City of Lafayette to be applicable to home rule cities.

In the leading case on point, *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N. D. Tex. 1978), Judge Higginbotham expressly rejected the contention that a constitutional home rule municipality whose powers flow directly from the state constitution should be regarded as a sovereign equivalent to the state itself. *Id.* at 1032. The judge found that argument to "stumble upon" the

reasoning of the Supreme Court majority in *City of Lafayette*. *Id.* Accordingly, Judge Higginbotham concluded that however sovereign home rule cities may be as a matter of state law, "[t]hey nonetheless carry the status of municipalities [rather than states] so far as federalism is concerned."[15] *Id.*

Judge Higginbotham's conclusion in *Surtran*, grounded as it is in the rationale of the *Lafayette* majority, lays to rest the contention of the Tenth Circuit that home rule powers in Colorado, because of their supposed breadth, are to be treated differently than home rule powers in other states. *See* 630 F. 2d at 706-07. Further support for Judge Higginbotham's conclusion is found in *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072 (N. D. Cal. 1979). There the court, "applying the *City of Lafayette* analysis," *id.* at 1096, expressly relied on the *Lafayette* majority's rationale, *id.* at 1088, and found Colorado cities not to have state action immunity from the antitrust laws when exercising their broad home rule powers under Colo. Const. art. XX, sec. 1.

In view of all of the foregoing, it is not surprising that only one court outside the Tenth Circuit has found a home rule municipality to have state action immunity.[16] *See Glenwillow Landfill, Inc. v. City of Akron*, 485 F.

---

15 Similarly, the court in *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. 737 (N. D. Iowa 1979), expressly noted that its analytical reliance on *Lafayette*, which included reference to the majority's rationale, *id.* at 743, would be unchanged regardless of the existence of home rule powers. *Id.* at 744 n. 8.

16 The most recent municipal home rule state action immunity case is from the Tenth Circuit and merely follows the holding in the instant case. *See Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. at 1210 (the exercise of municipal policy by a Colorado home rule city is the equivalent of state action and so qualifies for antitrust immunity).

Supp. 671 (N. D. Ohio 1979), *appeal docketed sub nom. Hybud Equipment Corp. v. City of Akron,* No. 80-3121 (6th Cir. Jan. 14, 1980). Moreover, in that case, unlike the instant situation, the state had enacted a comprehensive policy governing the particular subject-matter area in question and had created an agency to supervise the manner in which that policy was implemented by, *inter alia,* home rule cities. *Id.* at 675-77. Additionally, the state appellate courts had previously recognized that Ohio cities are authorized to engage in the particular type of anticompetitive activity which was there at issue. *Id.* at 677. Because of the existence of those factors, which are not present in the case at hand, *Glenwillow Landfill* is inapposite here.[17]

Thus, every court outside the Tenth Circuit which has considered the question has found that the mere existence of municipal home rule powers does not make a difference with respect to antitrust immunity. Contrary to the view of the Tenth Circuit, the *Airport Car Rental* court expressly found that the breadth of a particular Colorado home rule provision likewise makes no difference in that regard. Rather, it is the dual system of sovereignty embodied in the concept of federalism, and the fact that municipalities are not sovereign states, which is determinative. *See City of Lafayette v. Louisiana Power & Light Co.,* 435 U. S. at 412-13; *In re Airport Car Rental Antitrust Litigation,* 474 F. Supp. at 1088; *Woolen v. Surtran Taxicabs, Inc.,* 461 F. Supp. at 1032.

Moreover, any conclusion other than the preceding leads to the situation presently existing in the Tenth Cir-

---

17 Significantly, all three courts finding home rule municipalities to have state action immunity (in the instant case and in the *Pueblo Aircraft* and *Glenwillow Landfill* cases) completely ignored the rationale of both the majority and the plurality of the Supreme Court in *City of Lafayette.*

cuit, where antitrust immunity depends solely on whether a local government unit possesses home rule powers under state law, rather than on whether that entity meets the federal standards for immunity identified by this Court in *City of Lafayette*. In such situation, two types of anomalous consequences ensue. First, conflicting immunity results occur between home rule and non-home rule cities in the same state.[18] Second, opposite immunity results occur between home rule and non-home rule cities with respect to the same activity.[19] Yet, it is the challenged activity rather than the status of the city involved which is the proper focus for state action immunity analysis. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 420 (Burger, C. J., concurring). *Accord, Cantor v. Detroit Edison Co.*, 428 U. S. 579, 604 (1976) (Burger, C. J., concurring). Consequently, the approach taken by the Tenth Circuit is erroneous.

II. THE TENTH CIRCUIT'S ATTEMPT TO DISTINGUISH CITY OF LAFAYETTE ON THE GROUND THAT IT IS APPLICABLE ONLY TO SO-CALLED "PROPRIETARY" ACTIVITY IS UNFOUNDED.

As explained above, the precedential impact of *City of Lafayette* on the case at hand is not at all diminished by the fact that Boulder is a home rule municipality while

---

18 *Compare Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. 1205 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980) (Colorado home rule city immune), *with Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980) (non-home rule Colorado city not immune).

19 *Compare Pueblo Aircraft Serv., Inc. v. City of Pueblo* (home rule city's ownership and operation of municipal airport immune), *with Guthrie v. Genesee County*, 494 F. Supp. 950 (W. D. N. Y. 1980), *and Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543 (M. D. N. C. 1979) (non-home rule cities not immune in connection with ownership and operation of municipal airports).

the cities of Lafayette and Plaquemine, Louisiana, were not. Similarly, *City of Lafayette* may not be distinguished on the basis proferred by the Tenth Circuit that it involved "proprietary" activity, which supposedly does not qualify for immunity, while Boulder's action is "governmental," and therefore does so qualify. *See* 630 F. 2d at 708.

For one thing, two policy reasons militate against use of the proprietary-governmental distinction employed by the Tenth Circuit. First, such an analytical approach would lead to further anomalous immunity results. Even though the anticompetitive effects could be exactly the same, a city such as Boulder would not have antitrust immunity if it operated its own cable t.v. system but would be exempt if it simply allowed a private entity to operate the system in exactly the same way under regulation by the city. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 432-33 (Stewart, J., dissenting). Second, the wide range of services provided by governments in this day and age makes it almost impossible to determine what constitutes "proprietary" activity. *Id.* at 433-34 (Stewart, J., dissenting). Indeed, virtually any and all action by governments can subjectively be labeled "governmental." *Community Communications Co. v. City of Boulder*, 630 F. 2d at 717 (Markey, C. J., dissenting).

Additionally, *City of Lafayette* itself does not support the existence of the proprietary-governmental distinction utilized by the Tenth Circuit. Only one Supreme Court Justice even arguably could be said to have employed such an analytical approach in *Lafayette*. Moreover, what Chief Justice Burger actually did there was far less; he merely characterized the particular activity at issue *in that case* as being *in fact* proprietary in nature.

See generally 435 U. S. at 418-26 (Burger, C. J., concurring).

The foregoing analysis is borne out by an examination of the two state action immunity cases decided by this Court subsequent to *City of Lafayette*. Perhaps because of the policy considerations set forth above, neither Chief Justice Burger nor any other member of the Court there made any mention of a supposed proprietary-governmental distinction. *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U. S. 96 (1978).

Moreover, both of those decisions involved what subjectively could be characterized as purely "governmental" activity: the regulation by governmental agencies of distribution schemes pertaining to certain products (wine in *Midcal* and automobiles in *Fox*). Nevertheless, immunity was found to exist for the supposedly "governmental" activity in the one case (*Fox*) while it was not in the other (*Midcal*). If the proprietary-governmental distinction envisioned by the Tenth Circuit did in fact exist, both decisions should have resulted in a finding of immunity.

Midcal and *Fox* make clear, then, that the mere susceptibility of an activity to subjective categorization as "governmental" does not qualify it for state action immunity. Rather, it is the meeting of the case law-established requisites which entitles a particular activity to such immunity. *See* 445 U. S. at 105; 439 U. S. at 109. Simply put, then, any subjective classification of activity as "proprietary" or "governmental" in nature is meaningless for purposes of antitrust immunity analysis.

The vast majority of the lower court state action immunity cases support the foregoing analysis. As in *Mid-*

cal, several cases involving powers which could be classified as "governmental"—such as zoning,[20] regulating the practice of medicine or accounting[21] or the provision of ferry services,[22] or licensing liquor-serving establishments[23] —have resulted in a finding of no antitrust immunity. On the other hand, several cases involving the provision of "commercial" type services similar to those involved in *City of Lafayette* have nonetheless resulted in immunity.[24] Moreover, most post-*Lafayette* decisions have either expressly rejected[25] or simply not utilized such a distinction.[26]

In view of the foregoing, it is not surprising that apparently only two courts outside the Tenth Circuit have both utilized a proprietary-governmental distinction and found antitrust immunity for a governmental entity. *See Shrader v. Horton*, 471 F. Supp. 1236, 1242 (W. D. Va. 1979), *aff'd per curiam*, 626 F. 2d 1163 (4th Cir. 1980);

---

20 *Whitworth v. Perkins*, 559 F. 2d 378 (5th Cir. 1977), *vacated and remanded sub nom. City of Impact v. Whitworth*, 435 U. S. 992, *reinstated on remand*, 576 F. 2d 696 (1978), *cert. denied*, 440 U. S. 911 (1979); *Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980); *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. 737 (N. D. Iowa 1979).

21 *Feminist Women's Health Center v. Mohammad*, 586 F. 2d 530 (5th Cir. 1978), *cert. denied*, 444 U. S. 924 (1979); *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd per curiam*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979).

22 *Corey v. Look*, 641 F. 2d 32 (1st Cir. 1981).

23 *Grendel's Den, Inc. v. Goodwin*, 5 Trade Reg. Rep. (CCH) ¶ 63, 978 (1st Cir. May 4, 1981).

24 *E. g., Highfield Water Co. v. Public Serv. Comm'n*, 488 F. Supp. at 1179-81 (operation of water system); *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. at 673-74 (operation of solid waste disposal facility); *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. at 1346-47 (operation of electric, water and sewer services).

25 *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543, 552 (M. D. N. C. 1979).

26 *See, e. g.*, cases cited at nn. 20-24 *supra*.

Cedar-Riverside Associates v. United States, 459 F. Supp. 1290, 1298-99 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Associates v. City of Minneapolis*, 606 F. 2d 254 (8th Cir. 1979). Moreover, the courts in those two cases relied on the supposed distinction as only one factor among many in their overall state action analyses. Further, like the *Glenwillow Landfill* decision discussed above, both cases involved the existence of a comprehensive state policy to displace competition and a state agency with supervisory authority over such policy and so are inapposite here. *See* 471 F. Supp. at 1237-38; 459 F. Supp. at 1291-93, 1298.

In light of the foregoing, even if Boulder's regulation of cable t.v. subjectively may be classified as "governmental," that does not assure it of antitrust immunity. In any event, however, the activity here involved can best be characterized as proprietary in nature. Thus, even assuming *arguendo* that *City of Lafayette* applies only to proprietary activity, it still governs the instant case.

Simply put, Boulder's cable t.v. ordinances are contracts which represent a proprietary interest. *Community Communications Co. v. City of Boulder*, 630 F. 2d at 719 (Markey, C. J., dissenting). In fact, Boulder's involvement with cable t.v. is explicitly a profit-making venture; under its existing arrangement with CCC the city earns a 2 percent pure profit from CCC's cable operations. Boulder, Colorado, City Ordinance No. 2846 (Oct. 6, 1964) at ¶ 12 (App. G. to Colo. *amicus curiae* br. for *cert.*).[27]

---

27 Additionally, because cable t. v. is a commercial enterprise, see *Community Antenna Television v. City of Wichita*, 205 Kan. 537, 471 P. 2d 360 (1970), rather than a necessity of life, it does not qualify for public utility treatment under Colorado law. *See Ginsberg v. City and County of Denver*, 164 Colo. 572, 436 P. 2d

(Continued on next page)

Thus, whether or not *City of Lafayette* is construed as establishing a proprietary-governmental distinction is not dispositive with respect to the instant case. However interpreted, *Lafayette* cannot be distinguished so as to render it inapplicable here.

III. THE TENTH CIRCUIT HAS NOT PROPERLY APPLIED THE STATE ACTION IMMUNITY TESTS ESTABLISHED BY THE SUPREME COURT FOR ALL SUBORDINATE GOVERNMENTAL ENTITIES.

The so-called "state action exemption" from the federal antitrust laws is grounded in the dual federal-state system of sovereignty and the fact that Congress did not intend the Sherman Act to prohibit anticompetitive activity directed by a state. *Parker v. Brown*, 317 U. S. 341, 350-51 (1943). In recent years, decisions of this Court have established a trend consistently tightening the requirements for such exemption, thereby significantly limiting the ability of governmental entities to achieve anti-

---

(Continued from previous page)

685 (1968). Moreover, the granting to a corporation of the right to use a city's streets, the power by which Boulder purports to act here (see note 30 *infra*), constitutes the exercise of proprietary rather than governmental authority. *City and County of Denver v. Mountain States Tel. & Tel. Co.*, 67 Colo. 225, 230, 184 P. 604, 607, *dismissed for lack of jurisdiction*, 251 U. S. 545 (1919), *overruled on other grounds, People ex rel. P. U. C. v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 243 P. 2d 397 (1952). Furthermore, in its utilization of public rights-of-way cable t. v. is akin to taxicabs, which use public streets, and to airports and golf courses, which use public property, none of which have been found to enjoy antitrust immunity outside the Tenth Circuit. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N. D. Tex. 1978); *Guthrie v. Genesee County*, 494 F. Supp. 950 (W. D. N. Y. 1980), and *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543 (M. D. N.C. 1979); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F. 2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U. S. 992, *reinstated on remand*, 583 F. 2d 378 (1978), *cert. denied*, 439 U. S. 1090 (1979).

trust immunity for their activities.[28] *See, e. g., Bates v. State Bar of Arizona*, 433 U. S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U. S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975). Read together, the state action decisions of this Court mandate the undertaking of a thorough two-pronged inquiry in all cases involving the question of antitrust immunity for subordinate governmental entities.[29] A careful determination must be made whether there exists: (i) "contemplation" by the state that the local governmental entity will engage in the *kind* of anticompetitive activity complained of, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415; and (ii) a clearly articulated and affirmatively expressed *state* policy to displace competition with regulation or monopoly public service, and active supervision of that policy by the *state*, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U. S. at 105. *See generally Grendel's Den, Inc. v. Goodwin*, 5 Trade Reg. Rep. (CCH) ¶ 63,978 (1st

---

28 The limiting effect of *City of Lafayette* in particular has been expressly recognized by the lower courts. *See, e. g., In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1088 ("The Court [in *Lafayette*] therefore placed a significant limitation on the extent to which each local governmental unit could pursue its independent economic policies and still remain exempt from the scope of the antitrust laws."); *Shrader v. Horton*, 471 F. Supp. at 1241 ("The *Lafayette* Court . . . eroded the *Parker* state action immunity doctrine by holding that municipalities enjoy immunity from the antitrust laws under *Parker* only in limited circumstances."); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1029 ("Justice Brennan's conclusion [in *Lafayette*] sharply limits the antitrust immunity of municipalities and other state subdivisions.").

29 Where a subordinate governmental unit is involved, an even more thoughtful and thorough analysis than normal must be undertaken with respect to state action immunity. *Whitworth v. Perkins*, 559 F. 2d at 381.

Cir. May 4, 1981); *Corey v. Look*, 641 F. 2d 32 (1st Cir. 1981); *Stauffer v. Town of Grand Lake*, 987 Antitrust & Trade Reg. Rep. (BNA) A-9 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980).

A. The state constitutional grant of general home rule governing power to Colorado municipalities does not evidence contemplation by the State of Colorado that such power may be used in any anticompetitive fashion.

As a home rule city under Colo. Const. art. XX, sec. 6, Boulder has all of the powers conferred by art. XX, sec. 1, thereof on the city of Denver. Colo. Const. art. XX, sec. 6 (App. E to Colo. *amicus curiae* br. for *cert.*). Consequently, Boulder is specifically empowered, *inter alia*, to regulate "works or ways local in use and extent." *Id.*, sec. 1 (App. F to Colo. *amicus curiae* br. for *cert.*). Because Colorado municipalities have no express authority with respect to cable t.v., Boulder has always relied on this enumerated power over the public rights of way as the basis for its regulation of cable television.[30]

However, the *Airport Car Rental* court expressly held that the Colorado Constitution's broad grant of home rule power to operate in a particular subject-matter area under art. XX, sec. 1, does not confer state action immunity on a recipient municipality. 474 F. Supp. at 1096. Accordingly, the Tenth Circuit ignored the specifically enumerated power contained in art. XX, sec. 1, and in effect found Boulder to have antitrust immunity stemming from the even more vague general governing authority contained in art. XX,

---

30 See Boulder, Colorado, City Ordinances No. 2846 (Oct. 6, 1964) at ¶¶ 1-6, No. 4472 (Jan. 1, 1980) at ¶¶ 2-8, No. 4473 (Dec. 18, 1979) at ¶ 1, and No. 4515 (July 22, 1980) at ¶ 2 (Apps. G, H, I, and J, respectively, to Colo. *amicus curiae* br. for *cert.*).

sec. 6.[31] 630 F. 2d at 706-07. That provision has nothing to do with cable t.v. or even anticompetitive conduct; it merely confers on Boulder the right of self-government over local and municipal matters within its own borders.[32]

The mere grant of such general home rule governing power cannot *ipso facto* confer antitrust immunity on municipalities. For one thing, such power does not constitute "'authority . . . to operate in *a particular area . . .*'" and so cannot evidence contemplation of "'the *kind* of action complained of.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415 (emphasis added, footnote and citation omitted). Additionally, there can be no "contemplation" of any anticompetitive activity within the meaning

---

31 A virtually identical approach was employed by the courts in *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. at 1209-10, and *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. at 677-78.

32 An additional underpinning of the Tenth Circuit's opinion on Boulder's immunity was the decision in *Manor Vail Condominium Ass'n v. Town of Vail*, — Colo. —, 604 P. 2d 1168 (1980). The court below viewed that case as acknowledging, *sub silentio*, that the anticompetitive activity of setting rates for cable t. v. constitutes a valid exercise of municipal home rule power. 630 F. 2d at 706. However, *Manor Vail* was a fourteenth amendment equal protection case, and the Colorado court there considered no antitrust issues whatever. *See* 630 F. 2d at 718 (Markey, C. J., dissenting). Thus, it cannot be inferred from *Manor Vail* that Colorado home rule cities are empowered to engage in any anticompetitive activity relative to cable television. Moreover, *Manor Vail* did not involve the same type of activity as that at issue here. *Id.* n. 19. Consequently, even if interpretation of that case could be stretched to imply contemplation that home rule cities may set cable t. v. rates, it provides no authority whatever for such municipalities to engage in a *different kind* of activity such as imposing a limitation on expansion of cable t. v. service. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1031-32 (conferral of anticompetitive power to set rates and prohibit use of streets without governmental consent held not to contemplate use of such power to establish monopoly). Thus, in fact, *Manor Vail* provides no support for the Tenth Circuit's decision.

of *City of Lafayette* where, as here, there is no requirement or even suggestion regarding the *manner* in which such general governing power is to be used. *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. at 1096. Indeed, even the granting of general power to operate in a particular area does not evidence contemplation that such power may be used in any anticompetitive fashion.[33] *Id.* Finally, viewing amorphous general governing powers as authorizing anticompetitive conduct by home rule cities affords virtual blanket antitrust immunity to such municipalities *whenever* they exercise those powers, a result prohibited by *Lafayette*. *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. at 1031-32.

In view of the preceding, the conferral of general home rule governing power on Colorado municipalities by Colo. Const. art. XX, sec. 6, does not evidence contemplation by the State of Colorado that such power may be used in an anticompetitive manner.

---

33 *Accord, Feminist Women's Health Center v. Mohammad*, 586 F. 2d at 550 (general authority to police improper, unqualified or irresponsible practice of medicine does not comprehend use of such power in anticompetitive fashion to force termination of practices not adjudicated illegal or improper); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F. 2d at 590 (statutes conferring general authority over operation of golf courses neither compelled nor authorized anticompetitive exercise of such power to engage in price fixing); *Guthrie v. Genesee County*, 494 F. Supp. at 955-56, and *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. at 552 (statutes conferring general authority over establishment and operation of airports neither directed nor contemplated use of such authority in anticompetitive manner to prevent *particular* airline from becoming fixed-based operator); *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. at 743 (statute conferring general zoning powers neither mandated nor contemplated entry into anticompetitive agreements relative to exercise thereof); *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. at 404 (statute generally authorizing adoption of rules appropriate for maintaining high standards of professional integrity neither mandated nor contemplated adoption of rule prohibiting competitive bidding).

B. The State of Colorado has no specific policy with respect to cable television and does not exercise supervisory power over that subject-matter area.

In Colorado, there exists no express state policy relative to cable television. Neither the Colorado Constitution nor any state statute addresses the subject and no agency or mechanism has been established by Colorado for active supervision of cable television. Even the Colorado Public Utilities Commission has declined to exercise jurisdiction over the subject. *See In re Mountain States Telephone & Telegraph Co.*, 73 P. U. R. 3d 161, 172-173 (Colo. Pub. Util. Comm'n 1968).

In light of the foregoing, it cannot be said that Colorado has a comprehensive policy—which is clearly articulated, affirmatively expressed and actively supervised by the state—to displace competition in cable t.v. with regulation or monopoly public service as required by *Midcal. Community Communications Co. v. City of Boulder*, 630 F. 2d at 717 (Markey, C. J., dissenting). In fact, the only express cable t.v. policy or action involved in the case at hand is that of the city of Boulder itself: "[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado. . . . We have only the action or exercise of authority by the City. . . . [T]he regulation here concerned was . . . the only expression of policy as to the subject matter." *Id.* at 707.

Thus, there is no *state* policy which expressly relates to the subject of cable television. Like the situation in *Cantor*, the most that could be said here is that the state's express policy with respect to cable t.v. may be neutral. *See* 428 U. S. at 584-85. *See also Goldfarb v. Virginia State Bar*, 421 U. S. at 790. In such situation, Colorado presumably would intend that its home rule cities exercise their powers in a manner consistent with the antitrust

laws and the strong national policy in favor of competition. *See City of Lafayette v. Louisiana Power & Light Co*, 435 U. S. at 414-15; *Mason City Center Associates v. City of Mason City*, 468 F. Supp. 737, 743 (N. D. Iowa 1979).

Notwithstanding the foregoing, there are two policies of the State of Colorado which are implicitly applicable to cable television. The first such policy is that of conferring self-government on municipalities via home rule. That is not, however, a "state policy *to displace competition with regulation or monopoly public service . . .* " as required by *City of Lafayette*. 435 U. S. at 413 (emphasis added). Rather, it is merely a state policy to decentralize government. Moreover, in order to make such policy of localizing government work, it is neither necessary that cities have antitrust immunity at all nor that such immunity extend to every action they may undertake pursuant to their home rule powers. *See Cantor v. Detroit Edison Co.*, 428 U. S. at 597. *Accord, City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 417 (Marshall, J., concurring); *id.* at 426 (Burger, C. J., concurring); *Corey v. Look*, 641 F. 2d at 37.

Colorado's second state policy which is applicable to cable t.v. is the pro-competitive one set forth in its antitrust statute. *See* Colo. Rev. Stat. 1973, sec. 6-4-101 *et seq.*[34] *City of Lafayette* makes clear that pro-competitive antitrust policies take precedence over the parochial interests of individual cities. 435 U. S. at 408. Nevertheless, the court below conversely ruled that the actions and interests of the city of Boulder *alone* were sufficient to

34 The Colorado antitrust statute, because it ordinarily applies to Colorado cities and towns and establishes statewide policy, is applicable to home rule cities. *See* Colo. Const. art. XX, sec. 6 (App. E to Colo. *amicus curiae* br. for cert.).

override the policies expressed in the antitrust laws and meet the requisites of *Midcal*. 630 F. 2d at 708.[35]

In the thirty-eight years since the state action immunity doctrine was first announced in *Parker*, this Court has never found an antitrust exemption without action or an expression of policy by the *state itself*. Moreover, outside the Tenth Circuit, no post-*Lafayette* lower federal court case has found such immunity without the existence of both a state policy and a state supervisory agency. Even in the *Glenwillow Landfill* municipal home rule case both conditions were met. *See* 485 F. Supp. at 675-77. Consequently, antitrust immunity cannot exist in a situa-

---

35 The basis for the Tenth Circuit's holding in this regard was its determination that cable t.v. is a matter of purely local concern over which a Colorado home rule city has the full right of self-government. *Id.* at 706-07. Under Colorado law, however, whether a particular matter is of local concern depends, *inter alia*, on the inherent nature of the activity and its impact and effect, if any, on areas outside the city. *People ex rel. P. U.C. v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 172, 243 P. 2d 397, 399 (1952) (intra-city telephone service not purely local for Colorado home rule cities). The Tenth Circuit's reasoning fails because cable t.v. is inherently more than just local in character. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968) (cable t.v. involves interstate commerce); *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U. S. 556 (1970) (cable t.v. is in, and an integral part of, interstate commerce); *Nugent v. City of East Providence*, 103 R. I. 1518, —, 238 A. 2d 758, 762 (1968) (cable t.v. is not so restricted to city's confines as to be purely local for home rule purposes). Accordingly, a Colorado home rule city such as Boulder does not have complete authority relative to cable t.v., and its ordinance would be inferior to a general state law on the subject. *See Ray v. City & County of Denver*, 109 Colo. 74, 121 P. 2d 886 (1942). Moreover, in any event Colorado home rule municipalities are not city-states with plenary powers, *City of Golden v. Ford*, 141 Colo. 472, 478, 348 P. 2d 951, 954 (1960), *City of Denver v. Sweet*, 138 Colo. at 48, 329 P. 2d at 444-45, and so are not "sovereigns" equivalent to the state within their own borders.

tion, such as the one here, where there has been no action whatever by the state relative to the subject-matter area in question and the main state policy which is applicable favors competition.

———o———

CONCLUSION

In its decision in this case, the Tenth Circuit in effect found the city of Boulder, Colorado, because of its home rule status, to be the fifty-first state of the union and therefore to be exempt from the antitrust laws. The practical difficulty presented by such holding is that thousands of other cities across the country also possess extensive home rule powers for general governance. Yet, "Congress intended to strike as broadly as it could in section 1 of the Sherman Act, and to read into it so wide an exemption . . ." as that found by the Tenth Circuit here "would be at odds with that purpose." *Goldfarb v. Virginia State Bar*, 421 U. S. at 787.

The dual federal-state system of sovereignty which gives rise to the state action exemption requires that *states* be allowed to use their municipalities to administer *state* competition-displacement policies free of the inhibitions of the antitrust laws. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. at 415. Federalism neither requires nor allows cities, whether home rule or otherwise, to disregard the antitrust laws when *acting on their own* in the execution of *municipal* policies to displace competition. Accordingly, home rule cities may have state action immunity only where the state, acting as sovereign, has made an affirmative policy choice to insulate the activities of its subordinate governmental units in a particular subject-matter area from antitrust attack. Any

other conclusion elevates the purely parochial interests of individual local government units to a position of pre-eminence over the national economic policy favoring competition which is embodied in the antitrust laws. *See id.*

For all of the foregoing reasons, the twenty-three *amici* states joining in this brief request this Court to reverse the decision of the Tenth Circuit conferring absolute antitrust immunity on cities exercising home rule powers.

Respectfully submitted,

J. D. MacFARLANE
Attorney General

/s/ MARY J. MULLARKEY
Solicitor General

A member of the Bar
of this Court

/s/ THOMAS P. McMAHON
Assistant Attorney General
Antitrust Section
Counsel of Record

Not a member of the Bar
of this Court

Attorneys for the
State of Colorado
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: (303) 866-3611